



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-96-4

FACTS:

A. Background

You were hired by the one state agency ("Hiring State Agency") and were assigned to work full-time for another state agency, the Massachusetts Executive Office of Communities and Development ("EOCD"), which in a recent governmental reorganization has become the Department of Housing and Community Development ("DHCD"). Although you are on the Hiring State Agency's payroll and receive benefits through that agency, you report to DHCD personnel, who supervise you, assign you work and evaluate your job performance.

You recently purchased a residential rental property ("Building") containing three apartment units ("Units"). Two Units are occupied by rent-subsidized tenants, one subsidized through the Massachusetts Rental Voucher Program ("MRVP Program") and the other subsidized through the Section 8 Program.

B. MRVP Program and Section 8 Program

We will generally describe the MRVP Program and the Section 8 Program (collectively, "Programs").^{1/}

1. MRVP Program

In 1992, the Massachusetts Legislature replaced the former so-called Chapter 707 Rental Assistance Program ("Chapter 707 Program") with the MRVP Program. Under the Chapter 707 Program and its replacement MRVP Program, qualifying, low-income tenants' rents in privately owned housing accommodations were and are subsidized with monies that originate at the state level. DHCD, succeeding EOCD, now administers the MRVP Program; EOCD and/or the former Massachusetts Department of Community Affairs ("DCA") administered the Chapter 707 Program.

Under the MRVP Program, there are two types of rent subsidies: (i) so-called tenant-based subsidies that follow a specific tenant, rather than being "attached to" particular residential units or developments and (ii) so-called "project-based" subsidies for certain tenants in particular residential units or developments, such as those financed by the Massachusetts Housing Finance Agency, provided through project-based housing vouchers.^{2/}

a. State MRVP ACC Contract

In implementing the MRVP Program, DHCD enters into annual contributions contracts ("State MRVP ACC Contracts") with various "local housing agencies" ("LHAs")^{3/} pursuant to which DHCD agrees to fund the LHA for MRVP Program rent subsidies administered and disbursed by the LHA. DHCD is currently a party to such State MRVP ACC Contracts with the following LHAs: 159 Massachusetts city or town housing authorities, including the Housing Authority, as defined below; the Franklin County Regional Housing Authority; and nine Massachusetts regional, non-profit corporations.

b. MRVP Voucher Payment Contract

When a subsidized MRVP Program tenant has located a qualifying residential unit, the LHA contracts with the unit's landlord ("MRVP Voucher Payment Contract") to subsidize the tenant's rent by paying the subsidized portion thereof directly to the landlord. DHCD is not a party to the MRVP Voucher Payment Contract.^{4/}

c. Lease

The tenant pays the balance of the rent to the landlord pursuant to the tenant's separate leasing contract ("lease") with the landlord. Neither DHCD nor the LHA is a party to such leases.^{5/}

2. Section 8 Program

Under the Section 8 Rental Certificate Program and Rental Voucher Program ("Section 8 Program"),^{6/} qualifying, very low-income tenants' rents in privately owned housing accommodations are subsidized with monies that originate at the federal level and are regulated initially by the United States Department of Housing and Urban Development ("HUD").

a. Federal §8 ACC Contract

In implementing the §8 Program, HUD enters into annual contributions contracts ("Federal §8 ACC Contracts") for the administration and disbursement of its Section 8 Program rent subsidies only with "public housing agencies" ("PHAs")^{7/} as described below.

(i) HUD enters into Federal §8 ACC Contracts directly with Massachusetts city, town or county/regional public housing authorities (collectively, A Non-State PHAs"). DHCD is not a party to and plays no substantive role in such Federal §8 ACC Contracts or in the administration or disbursement of the associated Section 8 Program rent subsidies;^{8/} or

(ii) HUD enters into Federal §8 ACC Contracts directly with DHCD ("State PHA").^{9/}

We shall describe in parts b., c. and d. below only that component of the Section 8 Program described in clause (ii) above in which DHCD serves as HUD's State PHA ("State-Managed §8 Program") through which you receive Section 8 Program rent subsidies, not that component in which Non-State PHAs contract directly with HUD.

2. State §8 ACC Subcontracts - State-Managed §8 Program

As permitted (but not required) by HUD, DHCD enters into annual contributions subcontracts with other entities ("State §8 ACC Subcontracts") to administer and disburse the Section 8 Program rent subsidies.^{10/} DHCD is currently a party to State §8 ACC Subcontracts with ten entities: eight Massachusetts regional, non-profit corporations; the City of Lynn Housing Authority; and the Franklin County Regional Housing Authority (collectively, A Subcontractors").^{11/} Pursuant to each State §8 ACC Subcontract, DHCD agrees to fund the Subcontractor for Section 8 Program rent subsidies administered and disbursed by it.

Even though, DHCD has the Subcontractors undertake administration and disbursement obligations, DHCD retains ultimate responsibility for assuring that HUD's Section 8 Program requirements are satisfied. To that end, DHCD establishes policies and procedures for Subcontractors' administration and disbursement of Section 8 Program rent subsidies, disburses monies to the Subcontractors and monitors each Subcontractors' performance.

c. HAP Contracts - State-Managed §8 Program

When a subsidized Section 8 Program tenant has located a qualifying residential unit, the Subcontractor contracts with the unit's landlord ("Housing Assistance Payment" or AHAP Contracts")^{12/} to subsidize the tenant's rent by paying the subsidized portion thereof directly to the landlord.

d. Lease - State-Managed §8 Program

The tenant pays the balance of the rent to the landlord pursuant to the tenant's separate lease with the landlord. A HUD-required addendum must be included in such lease.

C. Your Rent-Subsidized Tenants

You receive rent subsidies through the two Programs, as summarized below.^{13/}

a. MRVP Program Tenant

This tenant's rent is paid to you, in part, by the tenant pursuant to a lease and, in part, by a certain municipality's housing authority ("Housing Authority"), as an LHA, pursuant to an MRVP Voucher Payment Contract.^{14/} The Housing Authority receives the funds to cover its payments of such rent subsidies pursuant to its State MRVP ACC Contract with DHCD.

b. Section 8 Program Tenant

This tenant's rent is paid to you, in part, by the tenant pursuant to a lease and, in part, by a certain Massachusetts regional, non-profit corporation ("Corporation"), as a Subcontractor, pursuant to a Section 8 Program HAP Contract. The Corporation, as a Subcontractor, receives the funds to cover its payments of such rent subsidies pursuant to its State §8 ACC Subcontract with DHCD. DHCD, as State PHA, receives the funds to cover its payments to the Corporation pursuant to its Federal §8 ACC Contract with HUD.

QUESTION:

Does your financial interest in the MRVP Program and/or Section 8 Program rent subsidies toward your tenants' rents violate G.L. c. 268A, §7.

ANSWER:

Yes.

DISCUSSION:

You were hired and are paid by the Hiring State Agency. You have been assigned to work full-time for DHCD and have reported to and been supervised, assigned work and evaluated by DHCD personnel. You are a state employee^{15/} of the Hiring State Agency within the meaning of G.L. c. 268A, and you participate in and have official responsibility for some DHCD activities.^{16/}

As a state employee, you are subject to the restrictions of §7, which prohibits a state employee from having a direct or indirect financial interest in a contract made by a state agency in which the Commonwealth or a state agency is an interested party unless he is eligible for and has received an exemption. The restrictions of §7 will not apply, however, to a state employee who, in good faith and within thirty days after he learns of an actual or prospective violation of the section, makes a full disclosure of his financial interests to the contracting agency and terminates or disposes of the interest. G.L. c. 268A, §7(a).

The theory behind §7 is well stated in the above-cited law review article by William Buss:

Section 7 announces a rule the basis of which is that, if no exemption is applicable, any state employee is in a position to influence the awarding of contracts by any state agency in a way which may be financially beneficial to himself. In a sense, the rule is a prophylactic one. Because it is impossible to articulate a standard by which one can distinguish between employees in a position to influence and those who are not, all will be treated as if they have influence.

W. G. Buss, *The Massachusetts Conflict-of-Interest Statute: An Analysis*, 45 B.U. Law Rev. 299, 374.

1. MRVP Program

Under the MRVP Program, landlords receive rent subsidies for qualifying tenants under contracts with LHAs, which in turn have contracts with DHCD. As applied to your situation, two questions arise under §7. First, is the State MRVP ACC Contract between DHCD and the Housing Authority, as an LHA, to provide MRVP Program rent subsidies that will subsidize your tenant's rent a contract made by a state agency in which a state agency is an interested party? Second, do you have a financial interest in that Contract?

Beginning at least as early as 1981, the Commission determined that Chapter 707 Program contributions

contracts between EOCD or DCA, as the administering state agency, and an LHA, which then paid rent subsidies to the landlord/state employee, was a contract made by a state agency in which the state agency was an interested party and in which the landlord/state employee had a financial interest. *EC-COI-81-189* (state legislator/partner in realty trust owning Chapter 707 Program rent-subsidized units would have impermissible financial interest in Chapter 707 contributions contract between DCA and the LHA even though the trust/landlord was not a party to that contract); *84-109* (judge/landlord of Chapter 707 Program rent-subsidized units had impermissible financial interest in contract between DCA and the LHA). In *EC-COI-87-14*, involving state agencies' financing low income housing projects, the Commission cited and adopted the rationale of its earlier opinions. *See also EC-COI-92-35*.

The MRVP Program is in all material respects the same as the former Chapter 707 Program. Thus, consistent with our precedent, we conclude (i) that DHCD's State MRVP ACC Contract with the Housing Authority to pay the Housing Authority for a portion of your tenant's rent obligation is a contract made by a state agency, namely DHCD, in which DHCD is an interested party and (ii) that, because you receive the subsidized portion of your tenant's rent from the Housing Authority pursuant to your MRVP Voucher Payment Contract, which is funded pursuant to the State MRVP ACC Contract, you have a financial interest in that state Contract.

2. Section 8 Program

a. State-Managed §8 Program

Under the State-Managed §8 Program, landlords receive rent subsidies for qualifying tenants under contracts with Subcontractors, which in turn have contracts with DHCD, which in turn has contracts with HUD. As applied to your situation, the same two questions arise under §7 as we posed in our analysis of your receipt of MRVP Program rent subsidies. First, is the State §8 ACC Subcontract between DHCD (as the State PHA) and the Corporation (as the Subcontractor) to provide Section 8 Program rent subsidies that will subsidize your tenant's rent a contract made by a state agency in which a state agency is an interested party? Second, do you have a financial interest in that Subcontract?

There does not appear to be any meaningful distinction between (i) DHCD's involvement, as a State PHA, in its State §8 ACC Subcontracts with Subcontractors such as the Corporation under the Section 8 Program and (ii) DHCD's involvement in its State MRVP ACC Contracts with LHAs such as the Housing Authority under the MRVP Program. In both Programs, DHCD plays a significant, substantive role, is an interested party to the subject contract and administers and disburses the funds to the entity that eventually contracts with the landlord to provide the rent subsidy. The fact that the Section 8 Program funds originate at the federal level and the MRVP Program funds originate at the state level does not change our view. Among other reasons, that is because DHCD retains ultimate responsibility for assuring that HUD's Section 8 Program requirements are satisfied, establishes policies and procedures for Subcontractors' administration and disbursement of Section 8 Program rent subsidies, disburses monies to the Subcontractors and monitors each Subcontractors' performance.

The Commission has on several occasions considered a state employee/landlord's receipt of State-Managed §8 Program rent subsidies. *EC-COI-84-105* involved a state legislator/landlord who was to receive Section 8 Program rent subsidies through the same type of multi-level contractual arrangements as you do. The Commission concluded that the legislator had an impermissible financial interest in EOCD's Section 8 ACC Subcontracts with the Subcontractor. In *EC-COI-82-12*, a state employee/landlord was to receive Section 8 Program rent subsidies through contractual arrangement in which EOCD, as State PHA, contracted with HUD and then entered the HAP Contract directly with the landlord, *i.e.*, EOCD had no Subcontractor.¹⁷ The Commission concluded that the state employee had an impermissible financial interest in a state contract. *Compare, EC-COI-81-189*, involving the state legislator/partner in a realty trust that received Section 8 Program rent subsidies emanating from a HUD Federal §8 ACC Contract with a Non-State PHA in which EOCD played a minimal role and was not a party to any contracts, where the Commission determined that such an interest would not implicate §7 for the legislator but specifically limited its conclusion to the facts of the case, reserving "its right to rule on the propriety of other contractual arrangements under the Section 8 Program which involve EOCD or DCA as a party to the contract." *Id.* n. 4.

Thus, as DHCD's role in the State-Managed §8 Program is in all material respects the same as its role in the management of the MRVP Program and consistent with our precedent, we conclude (i) that DHCD's State §8

ACC Subcontract with the Corporation to pay the Corporation for a portion of your tenant's rent obligation is a contract made by a state agency, namely DHCD, in which DHCD is an interested party^{18/} and (ii) that, because you receive the subsidized portion of your tenant's rent from the Corporation pursuant to your HAP Payment Contract, which is funded pursuant to that Subcontract, you have a financial interest in that Subcontract.

b. Section 8 Program Rent Subsidies - Managed by Non-State PHAs

In reaching the conclusion above regarding State-Managed §8 Program rent subsidies in which DHCD plays a substantive and contractual role, we do not alter our precedent addressing Section 8 Program rent subsidies that flow directly from HUD to Non-State PHAs, with no substantive involvement of any state agency, where we concluded that no state contract was involved. *EC-COI-84-109; 81-189*. In other words, this opinion does not pertain to Section 8 Program rent subsidies that are funded by non-state sources and managed by Non-State PHAs in which state agencies are not parties to contracts and play no substantive role.

3. Termination/Disposition of Financial Interests in Contracts

As you have a financial interest in DHCD's State MRVP ACC Contract with the Housing Authority and in DHCD's State §8 ACC Subcontract with the Corporation and there are no §7 exemptions available to you,^{19/} you must make full written disclosure to DHCD of your financial interests in those two contracts and terminate or dispose of your interests.^{20/} In certain opinions involving housing and rent subsidies paid to a state employee/landlord, the Commission has permitted extra time in order to avoid undue hardship to innocent third parties, namely the tenants. *EC-COI-84-109; 84-105; 82-12; 81-189*, all cited above. *See also, EC-COI-83-117* (municipal employee/landlord) and *83-63* (county employee/landlord).

4. Possible Legislative Amendment

We are aware that this conclusion gives rise to concerns for other state employees who own residential rental properties that are or may be rented to tenants receiving MRVP Program or Section 8 Program rent subsidies. Indeed, it appears to have been for that reason that, in 1985, after issuing its 1983 and 1984 opinions cited above (*EC-COI-84-105; 84-109; 83-117; 83-63*), the Commission drafted, filed and supported the Legislature's enactment of a bill (House No. 1564) that would have permitted state, county and municipal employees to receive "housing assistance payments" on behalf of eligible tenants pursuant to a program of leased housing or rental assistance provided that the state, county or municipal employee, as the case may be, did not participate in or have official responsibility for the activities of the administering state, county or municipal agency, respectively.

That bill was not enacted. However, in 1987, the Legislature amended §20, the counterpart provision of §7 applicable to municipal employees, by adding clause (h), exempting from §20's general prohibition "a municipal employee who is the owner of residential rental property and rents such property to a tenant receiving a rental subsidy administered by a local housing authority, unless such employee is employed by such local housing authority in a capacity in which he has responsibility for the administration of such subsidy programs." *See EC-COI-92-31* (involving a leased housing inspector for a municipal housing authority who, as a private landlord, received from the authority housing subsidy payments on behalf of a tenant and qualified for the §20(h) exemption).

The Legislature did not enact a parallel amendment of §7.^{21/}

If it had, such an amendment would have narrowed significantly the restrictive effects of §7 by exempting from §7's general prohibition a state employee, such as you, who is the owner of residential rental property and rents such property to a tenant receiving a rental subsidy administered by a state agency, unless such employee is employed by such state agency in a capacity in which he has responsibility for the administration of such subsidy programs.

DATE AUTHORIZED: November 19, 1996

^{1/} The Directors of each of the Programs provided us information about the history, administration and operation of the Programs.

^{2/} The MRVP Program subsidies are currently approximately 60% tenant-based and approximately 40% project-based. The tenant-

based component is known as the MRVP Mobility Program because tenants have more flexibility in choosing housing accommodations. Tenants entitled to MRVP Program rent subsidies receive either “mobile” vouchers or project-based housing vouchers.

^{3/} The regulations governing the MRVP Program define “Local Housing Agency (LHA)” as “Local Housing Authority, a Regional Non-Profit Corporation or other entity under contract to the Department to administer the [MRVP] Program.” 760 Code Mass. Regs. § 49.03.

^{4/} When DHCD’s predecessor state agencies administered the MRVP Program and the Chapter 707 Program, they were not parties to any such contracts with landlords either.

^{5/} The former Chapter 707 Program was somewhat different in that the LHA, the landlord and the tenant were all parties to one contract, which combined the operative provisions of what are now the separate MRVP Voucher Payment Contract and the lease. However, in all respects material to this analysis, the former Chapter 707 Program and the MRVP Program are similar.

^{6/} The vast majority of Section 8 Program rent subsidies in Massachusetts are tenant-based.

^{7/} The federal regulations governing the Section 8 Program define “Public Housing Agency (PHA)” and “Housing Agency (HA)” as the “same thing,” namely, “A State, county, municipality or other governmental entity or public body (or agency or instrumentality thereof) authorized to engage in or assist in the development or operation of low-income housing” 24 C.F.R.

§ 982.4. HUD is not authorized to and does not enter into Federal §8 ACC Contracts with private entities.

^{8/} DHCD performs a merely *pro forma* sign-off function on such Federal §8 ACC Contracts between HUD and Non-State PHAs.

^{9/} Of the 57,000 Section 8 Program rent subsidies for Massachusetts tenants, 74% flow directly from HUD to Non-State PHAs, without DHCD involvement; the other 26% flow from HUD to DHCD, a State PHA. (The foregoing figures are approximate.)

^{10/} DHCD is authorized to perform such functions itself if it so elects. In fact, before 1990 in the Greater Boston area, EOCD and DCA did not subcontract such responsibilities. Rather, they dealt directly with and disbursed Section 8 rent subsidies directly to landlords of subsidized tenants.

^{11/} We are informed that a public housing authority may serve as a Non-State PHA under a Federal §8 ACC Contract with HUD for certain Section 8 Program funds at the same time as it serves as a Subcontractor under a State §8 ACC Subcontract with DHCD for State-Managed Section 8 Program funds. Furthermore, such a housing authority may simultaneously serve as an LHA under a State ACC Contract with DHCD for MRVP Program funds.

^{12/} Such HAP Contracts incorporate and impose HUD’s require-ments as well as DHCD’s own requirements for the administration and disbursement of Section 8 Program subsidies.

^{13/} When you purchased the Building, you believed that both rent-subsidized tenants were subsidized through the Section 8 Program.

^{14/} This tenant receives and presents MRVP “mobile” housing vouchers.

^{15/} “State employee,” a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council. . . . G.L. c. 268A, §1(q).

^{16/} Because nothing in this opinion turns on whether you are also a “state employee” of DHCD, we need not decide that issue.

^{17/} Presumably, this took place in the Greater Boston area, where (before 1990) EOCD did enter HAP Contracts directly with landlords.

^{18/} To the extent that our brief reference in *EC-COI-92-35*, n.3., to the Section 8 Program suggests otherwise, based on the facts we have now been provided, we clarify that a State-Managed Section 8 Program rent subsidy does involve a contract made by a state agency in which a state agency is an interested party within the meaning of §7.

^{19/} The §7(b) exemption is available only to state employees who are not employed by the contracting agency and do not participate in or have official responsibility for any activities of the contracting agency.

^{20/} You have said that you intended to dispose of your interest in the Building if the Commission were to reach this conclusion.

^{21/} We also note that the Legislature did not enact a parallel exemption for county employee/landlords.